No. 83 442

In The

Supreme Court of the United States

OCTOBER TERM, 1983

PAUL HILL,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1) Whether, where jury verdict establishes Government entraps defendant into criminal scheme, defendant is entitled, as a matter of law to dismissal of charges which are products and object of the original criminal scheme and induced by Government ?

2) Whether, following trial on seven count indictment where defendant has raised defense of entrapment, a verdict of acquittal of conspiracy and one overt act in furtherance of alleged conspiracy, precludes, upon remand following appeal and where defendant again raises defense of entrapment, relitigation of remaining five substantive counts of original indictment, if said counts embody specific objects and overt acts of alleged conspiracy, because of double jeopardy by way of collateral estoppel ?

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court Of Appeals for the Third Circuit, entered in this case on June 15, 1983.

OPINIONS BELOW

The Judgment Order of the United States Court Of Appeals for the Third Circuit, affirming the judgment of the United States District Court is not yet reported. A copy of the Judgment Order is printed in the Appendix at page 1a.

The opinion of the United States District Court for the Eastern District of Pennsylvania following the second trial, is reported at 550 F. Supp. 983(E.D. Penn. 1982). A copy of this opinion is printed in the Appendix at page 3a.

The opinion of the United States Court of Appeals for the Third Circuit, reversing and remanding the judgment of the United States District of the United States District Court, following the first trial is reported at 655 F2d 512(3rd Cir. 1981). A copy of this opinion is printed in the Appendix at page 36A.

The opinion of the United States District Court for the Eastern District of Pennsylvania, which was reversed by the appellate court, is reported at 481 F. Supp. 558 (Ed. Pa. 1979). A copy of this opinion is printed in the Appendix at page 46A.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, reprinted in the Appendix at page 1A was entered on June 15, 1983. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT FIVE, WHICH PROVIDES:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or pro-

perty, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Sometime prior to February, 1979, Leonard Newton, was a major drug dealer in California. Because of " heat " or legal troubles, Newton moved to Philadelphia. The Government and the Special Agent in charge of the instant case were aware of Newton and his moves.

Newton settled at a location (Society Hill) in Philadelphia nearby Krass Brothers Clothing Store where defendant had worked for some twelve years as a salesman. Newton met and befriended defendant at Krass Brothers.

Defendant PAUL HILL had no history or record of drug dealings prior to March of 1979. As a matter of fact, defendant's reputation was impeccable.

Strangely, government's informant, one Ian Daniels began frequenting Krass Brothers store in February of 1979, making contact with defendant about the need for heroin.

Daniels pursued defendant with requests for a source for heroin on several occasions. Because of Daniels' persistence

Hill relented and made contact with Newton. See Appendix at page 36A.

Once the source was established in Newton a purchase of heroin followed on March 14 and 29, 1979, April 23 and June 12 and 18, 1979.

All of the sales were part of the original plan and scheme requested by Government and arranged by defendant.

Every transaction involved agents who were involved by the Special Agent in charge and pursuant to the original plan induced by Daniels.

Prior to this period involving these transactions, defendant had no intention or predisposition. This is clearly evidenced by the candid statements of defendant on informant's recorded tape of May 1, 1979 (on which informant is attempting to get non-existent incriminating evidence). See Appendix pages 64A - 65A.

In that tape, which defendant was not aware of, defendant clearly states that except for the pressured urgings of government he would not have gotten into these transactions.

" I did it because you cats persisted "

See Appendix page 64A . On the other hand the informant Daniels, an illegal alien, was induced by a desire to catch this man.

Defendant was charged with conspiracy and six counts of distribution of heroin. The jury found defendant not guilty of conspiracy and the first count of distribution and guilty of the remaining five counts of distribution.

The only issue of defense in this case has been entrapment. The issue was hotly contested throughout trial, defense conceding guilt of crimes throughout.

After days of trial the jury obviously found defendant entrapped into the conspiracy charged, by its verdict of not guilty to conspiracy and the first substantive count of distribution.

The jury clearly wanted to know the legal impact of entrapment at the beginning of the scheme on the subsequent charges, when they asked:

> " Your honor, if the defendant was entrapped could the defendant be not guilty of all counts (counts 1 to count 7)? "

and

" Can defendant be guilty of counts 2 to 7, (distribution) if entrapment was involved in any count ? "

See Appendix page 66A.

The trial Court's answer allowed the jury to consider a number of factors other than the sole question of whether the subsequent activities were products of the original inducement and plan.

Post Verdict Motions were filed requesting acquittal based on the record, which were denied.

Appeal followed in the Third Circuit Court Of Appeals. The case was remanded on July 23, 1981, for a new trial on a separate issue involving admissibility of psychological evidence. The issue of the effect of the jury's acquittal, i.e., initial entrapment of defendant on the subsequent charges of criminal activities was not addressed.

On remand, defendant interposed motions to bar retrial, among other reasons, because (1) the jury's verdict had binding effect on all charges of acquittal because of entrapment and (2) the impossibility of retrial without relitigation of issues found

favorable to defendant, thus placing defendant in double jeopardy.

These motions, both prior to and subsequent to retrial were denied, defendant having been found guilty on the remaining charges at the retrial.

A second appeal followed to the Third Circuit Court Of Appeals sitting in panel advancing these issues.

The Third Circuit Court Of Appeals, after argument, affirmed, without comment the decision of the United States District Court on June 15, 1983.

REASONS FOR GRANTING THE WRIT

Ever since this Court's pronouncements in Sherman v. United States 356 U.S. 369, one should assume criminal acts subsequent to and products of original entrapment would fall to the prohibition of entrapment.

Indeed the question of how far the protection of an entrapment defense went beyond original acts has not been confronted since Sherman, supra. Consequently, different Appeals Courts and District Courts have found distinctions in different cases or responded in confusion. Such is the instant case, where both Appeals Court and District Court refuse to accept the responsibiltiy of clearly providing the limits of the protection of original entrapment. Rather, the jury is cast the burden in such a vital area.

Unless the confusion as to the applicability of the pronouncements of the Sherman case is cleared there will be uncertainty in the law not only in the area of great individual importance but also to the administration of law - because of substantial questions of double jeopardy and uniformity arising within and among circuits.

THE THIRD CIRCUIT'S RULING CONFLICT WITH PRIOR FUNDAMENTAL HOLDINGS OF THIS COURT, CONFLICTS WITH PRIOR HOLDINGS WITHIN THE THIRD CIRCUIT AND MISAPPLIES THE LAW UNDER THE FACTS OF THIS CASE.

Every possible view of this case clearly demonstrates the offenses for which defendant was convicted were activities produced from the original scheme and design induced by Government agents. The Government's case supports this, the record supports this and there is not one iota of argument showing the activities in question to be anything other than a pure " course of conduct " which was the product of the (original) inducement as in the Sherman case.

Defendant advanced from the very beginning in the first trial on through the second trial and second appeal - that there was no departure in this record from the Sherman case, supra except the Supreme Court found as a matter of law what the jury found in the instant case as a matter of fact.

The sole remaining issue, the legal impact of the original entrapping conduct, is a matter of law. In the instant case once the jury determined defendant was entrapped, the Courts were obligated to dismiss the re-

maining subsequent charges.

In the instant case the jury at least candidly confronts the question when it asked the District Court:

> " Your honor, if the defendant was entrapped could the defendant be not guilty of all counts, (counts 1 to count 7)? "
>
> and
>
> " Can defendant be guilty of counts 2 to 7, (distribution) if entrapment was involved in any other count ? "

See Appendix page 66A.

The District Court and later the Appeals Court recoils from its responsibility. We suggest the court should have dismissed the remaining charges once the jury established entrapment originally, or instructed the jury, under the circumstances, that if they found defendant entrapped into the original conspiracy they must find him not guilty or entrapped into the remaining counts. In affirming the District Court, the Third Circuit also retreated from its responsibility under Sherman, supra, Clearly the record required the dismissal under Sherman v. United States.

In each instance, the District Court and the Third Circuit chose to avoid confronting Sherman or to ignore its pronouncements.

As to the Third Circuit Court Of Appeals, there is no comment in its opinion, but strangely no discussion by the Court or Government successfully pointing out its non-applicability exists. A fortiori, where defendant advances a basic contention as controlling in following the Supreme Court, no comment is tantamount to ignoring that principle or conceding its applicability by implication.

The District Court, just gives lip-service, by footnote to Sherman v. United States, where he states he had the jury decide whether the subsequent acts were

> " independent acts subsequent to the inducements - or part of a course of conduct. "

In the posture of the case as it was the court, per Sherman, should have assumed responsibility, as a matter of law. See Appendix at page 53A.

The District Court, The Third Circuit Court and the Government, rather than confronting to applicable scope of originally

entrapping conduct, rhetorically poses the question

" once entrapped mean always entrapped. "

This rhetorical question, however does not shed light on where to place the limit or scope, once entrapment prevails, on subsequent conduct.

Ironically, The District Court nor the Appeals Court seek to deny the principles in Sherman, supra. In the case of United States v. West, 511 F2d. 1083 (3rd Cir. 1975), the Third Circuit correctly separated, as a matter of law, those acts which were a product of the government scheme and those which were part of the original entrapment. To do less in the instant case creates uncertainty and conflict.

To allow the judgment to stand in the instant case would in effect overrule Sherman, supra.

Research is not apt to find too many instances, as in this case, where a jury has found entrapment and ask for guidance as to applicability of that conduct on subsequent counts of a multi-count charge.

In this instance certainty and uniformity are needed both to provide standards

and limits but also to clarify the roles of the court versus the jury in this area.

FOLLOWING TRIAL ON SEVEN COUNT INDICTMENT WHERE DEFENDANT HAS RAISED DEFENSE OF ENTRAPMENT, A VERDICT OF ACQUITTAL OF CONSPIRACY AND ONE OVERT ACT IN FURTHERANCE OF ALLEGED CONSPIRACY, PRECLUDES, UPON REMAND FOLLOWING APPEAL AND WHERE DEFENDANT AGAIN RAISES DEFENSE OF ENTRAPMENT, RELITIGATION OF REMAINING FIVE SUBSTANTIVE COUNTS OF ORIGINAL INDICTMENT, IF SAID COUNTS EMBODY SPECIFIC OBJECTS AND OVERT ACTS OF ALLEGED CONSPIRACY, BECAUSE OF DOUBLE JEOPARDY BY WAY OF COLLATERAL ESTOPPEL.

In initial trial, petitioner raised the defense of entrapment, thereby admitting all acts charged. The government's major burden then, as in the subsequent trial, was to prove beyond a reasonable doubt, petitioner's predisposition to commit proscribed acts. The government's case, as demonstrated was based on proving the existence of a conspiracy between petitioner and Leonard Newton to engage in a series of drug sales to federal undercover agents. Each sale date - March 13, 14, 29, April 23, June 12, 18, 1979 - became one count of a seven count indictment, the seventh being a conspiracy charge.

Following trial, petitioner was acquitted of conspiracy as well as all charges relating to the initial, March 13, 1979 sale date. Due to inadequent and erroneous instructions by the District Court, petitioner was convicted of all remaining counts. Upon remand, following petitioner's successful appeal, the government proceeded to retry him on the five remaining counts of the indictment. Once again, the government's major burden was to prove beyond a reasonable doubt, petitioner's predisposition to engage in illegal drug transactions. Once again, the government's theory of the case went towards demonstrating the existence of a conspiracy between petitioner and Leonard Newton to engage in drug sales. From beginning to end, each and every detail involving these charges that was presented to the second jury, specifically related to the alleged conspiracy which petitioner had been acquitted of. The record is replete in demonstrating that the crucial thrust of this reprosecution was the arrangement, agreement, partnership and mechanism of distribution that allegedly existed between Hill and Newton. The government insisted, in fact, this was a " partnership situation " between Hill and Newton. See Appendix page 67A.

In form, substance and effect, the second trial was no less than a relitigation of all facts and issues from the prior trial, including those on which he had won acquittal. This result occurred largely due to the fact that all drug sales subsequent to March 13, 1979, were brought about, in totality, because of illegal government activities before and leading up to above date. Petitioner contends that it was legally impossible to reprosecute him without subjecting him to former jeopardy. Therefore, the doctrine of collateral estoppel precludes said reprosecution.

Collateral Estoppel, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. United States v. Keller, 624 F2d 1154, 1157 (3rd Cir. 1980), quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322,326, 99 S. Ct. 645,649, 58 L.Ed.2d 552 (1979). In Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed. 2d 469 (1979), this court held there was a basis for the doctrine in the Fifth Amendment's guarantee against double jeopardy.

Where retrial exposes a defendant to relitigation of the crucial thrust of government evidence at prior trial wherein he was acquitted, double jeopardy by way of collateral estoppel requires dismissal. Sealfon v. United States, 322 U.S. 575, 68 S. Ct. 237; United States v. Pappas 445 F2d 1194 (3rd Cir. 1971). In " Sealfon ", the government had prosecuted defendant on a conspiracy charge of which he was acquitted. In a subsequent trial on substantive counts of aiding and abetting, the court said:

> " Thus the only question in this case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. This depends on the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial---so interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical. As we read the records of the two trials, petitioner could be convicted of either offense

> only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way --- it was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do so. " Sealfon v. United States, supra, 332 U.S. at 579.

The Third Circuit Court Of Appeals attempted to apply these principles in the Pappas case noting:

> " The Supreme Court examined the circumstances of both trials and found that the crucial thrust of the government's evidence at the second trial was the alleged agreement found by the jury in the first trial to be non-existent. Accordingly the Court held that Sealfon's conviction at the second trial was error, because the basic facts found at the first trial necessarily decided an issue in favor of the defendant fundamental to a proper conviction by the second jury and thus

> foreclosed a finding that Sealfon was guilty. " United States v. Pappas, supra 445 F2d at 1198.

Although the District Court recognizes these principles, it maintains they have no applicability here. Rather, it evades its duty to avoid double jeopardy by arguing that the initial verdict of acquittal did not establish entrapment. Therefore, it did not foreclose anything or any fact from reprosecution. It reached this result largely by maintaining that the initial jury's verdict of acquittal was merely a result of inconsistent verdicts, sympathy with the defendant or any number of things. See Appendix at page 17A . Such reasoning, however, completely ignores the fact that:

1) Petitioner, at both trials raised defense of entrapment, admitting complicity in all charges.

2) Each and every aspect of the government's offer of proof revolved around demonstrating an ongoing agreement between Hill and Newton to conduct a series of drug transactions which originated in February, 1979 and terminated with their arrests in June, 1979.

3) The most telling indication of the

first jury's motivations came in the form of two notes sent to trial judge during deliberations. The inquiry and the court's instructions made it abundantly clear defendant was acquitted because he successful established entrapment at the beginning of his involvement with government agents, to wit:

> " Your honor, if the defendant was entrapped, could the defendant be not guilty of all counts? "
>
> and
>
> " Can the defendant be guilty of counts two to seven if entrapment was involved in any other count ? "

See Appendix at page 66A..

The Court did not answer these questions directly or even correctly, but reduced them to one, to wit:

> " ... if you find that there was entrapment as to any one count, does that mean that there was of necessity entrapment as to all counts ? "

See Appendix at page 66A.

Petitioner contends that it could not be seriously argued that the first jury did not find entrapment as basis for its

acquittal of petitioner. Petitioner further contends that he has the right not to be re-prosecuted utilizing facts and issues already determined in his favor at subsequent trial.

In deciding whether an issue that the defendant wishes to foreclose from consideration in a second trial was necessarily determined in defendant's favor by a prior general verdict of acquittal, courts are to apply the doctrine of collateral estoppel not

> " with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. "

Ashe v. Swenson, 397 U.S. 436,444, 90 S.Ct. 1189, 1194, 25 L.Ed. 2d 469 (1970). The Court explained that

> " (w)here a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. "

United States v. Keller 624 Fed. 2d 1154, 1158 (3rd Cir. 1980).

We submit the only issue in this case has been sucessfully resolved in defendant's favor --- i.e. whether he was predisposed to a scheme of illegal distribution of heroin or induced by illegal entrapment into such a course of conduct.

To relitigate evidence supporting the remaining substantive counts, as well as that evidence prior to the March 14, 1979, is a clear reprosecution of the crucial thrust of government evidence at the prior trial, i.e. that defendant was predisposed to engage in a plan to and thereafter did distribute heroin.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Court Of Appeals For The Third Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1082
No. 82-1728

UNITED STATES OF AMERICA

v.

PAUL HILL,

Appellant

(Criminal No. 79-00161-02 - E.D. Pa.)

District Judge: Honorable J. William Ditter, Jr.

Argued June 9, 1983

BEFORE: SEITZ, Chief Judge, SLOVITER, Circuit Judge, and SAROKIN, District Judge. *

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to wit, that (1) as a matter of law substantive counts must be dismissed since prior verdict of acquittal esta-

blished defendant was entrapped into commission of sais counts, (2) defendant's acquittal by way of entrapment in prior trial precludes relitigation of substantial counts because of double jeopardy, (3) the trial court prejudicially erred in permitting evidence of crimes of which defendant was acquitted by reason of entrapment, (4) the trial court erred in refusing defendant's evidence of verdict of prior acquittal to rebut evidence in subsequent trial of predisposition, amd (5) the trial court erred in not granting pre-trial hearing under United States v. Inmon to avoid double jeopardy, it is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

_____

Chief Judge

ATTEST

_____

DATED: June 15, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO.
vs.	:	79-161
PAUL HILL	:	

OPINION

DITTER, J. OCTOBER 1, 1982

Paul Hill was convicted for a second time of five counts of distributing heroin. His post-trial motions contend the second trial was barred by collateral estoppel and double jeopardy, and that there was error in pre-trial and trial rulings. For the reasons which follw, his motions must be denied.

Because the facts have been discussed in my prior opinion, 481 F. Supp. 558 (E.D. Pa. 1979), reversed and remanded, 655 F. 2d 512 (3rd Cir. 1981),[1] I will only mention them briefly. Hill was employed as a

(1) A version of the facts appears in the opinion of the Court Of Appeals.

clothing salesman for Krass Bros. in Philadelphia. On March 9, 1979,Hill was approached by Ian Daniels, a government informant, who inquired about purchasing heroin. Thereafter, on March 13, 1979, Hill gave Daniels a small sample of heroin. Daniels gave the sample to his superiors at the Drug Enforcement Administration (DEA) who, after chemical analysis, determined Hill had access to high quality heroin. Because heroin of such quality usually comes from someone close to the source of importation, the DEA, through Daniels and other government agents, arranged purchases of heroin from Hill and Leonard Newton on March 14, 29, April 23, June 12, and June 18, 1979. Hill and Newton were arrested during the June 18, 1979, sale.(2)

Hill was indicted on six counts of distributing heroin and aiding and abetting in violation of Title 21,United States Code,

(2) Leonard Newton entered a plea of guilty.

section 841 (a)(1), and Title 18, United States Code, section 2(a), and one count of conspiracy to distribute heroin.[3] Rather than deny the acts which constituted the offense, Hill claimed he was entrapped by government agents. In September, 1979, a jury found Hill not guilty of conspiracy (Count 1) and one distribution count relating to March 13, 1979, (Count 2), and guilty on the remaining five counts (Counts 3-7). Ruling that I had "misapprehended" the nature of an offer of proof and "applied too restrictive a view to such offered testimony," the Court Of

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(3) 21 U.S.C. 841(a)(1) provides:
(a) Except as authorized by this subchapter it shall be unlawful for any person knowingly or intentionally --
(b) to manufacture, distribute or dispense, or possess with intent to manufacture , distribute, or dispense, a controlled substance. . ..
18 U.S.C. 2(a) provides:
Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principle.

Appeals reversed and remanded the case for a new trial. United States v. Hill, 655 F. 2d 512, 514 (3rd Cir. 1981).

Shortly after the mandate from the Court Of Appeals was filed on October 6, 1981, the Government expressed its intention to retry Hill on the five distribution counts. On February 1, 1982, literally on the eve of the second trial, Hill filed a motion to dismiss based on the doctrine of collateral estoppel as it applies to criminal cases, and double jeopardy. I denied that motion as frivolous. After an eight day trial, Hill was found guilty on all counts.

Hill first asserts I erred in ruling against his collateral estoppel contentions. His basic argument as to collateral estoppel was advanced in three ways:

First, Hill moved to dismiss the indictment maintaining that the jury's verdict of not guilty on the conspiracy count constituted a finding that he had been en-

trapped and remained entrapped during the time span of the alleged conspiracy which encompassed each of the distribution counts. Because of his contention that the issue of his criminal intent during the conspiracy was found in his favor at the first trial, Hill argued the second trial forced him to relitigate that issue. (4) Additionally, and as part of his motion to dismiss, Hill maintained that the not guilty verdict as to the conspiracy would require preclusion at trial of all evidence that tended to prove the conspiracy regardless of whether it tended to prove the five distributions, because of necessity, he had defended against that evidence successfully at the first trial.

Second, Hill made basically the same argument in objecting to the introduction of

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(4) This may another version of Hill's "once entrapped always entrapped theory," i.e., entrapment on one date as a matter of law precludes conviction as to all subsequent dates.

evidence at trial, contending that any evidence which would tend to show the existence of matters referred to in the conspiracy count could not be offered because of the not guilty verdict at the first trial. Preclusion of such evidence would have effectively barred reprosecution on all five distribution counts and would have led to a directed verdict for Hill at the second trial.

Third, Hill asserted that any evidence which would show there had been a conspiracy or that would show there had been a distribution on March 13, 1979, could not be received because all facts pertaining to those charges were resolved in his favor at the first trial, he was not being tried on those matters, and therefore evidence concerning them was irrelevant. (5)

---

(5) The jury at Hill's second trial was not informed there had been an earlier trial, a charge of conspiracy, or a charge of unlawful distribution as to March 13.

I denied his motion to dismiss and overruled his objections to the evidence, but did rule that any evidence which pertained solely to the conspiracy or solely to the distribution on March 13 could not be received.[6] There was no error in these rulings.

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(5) cont'd
Hill objected to my refusal to allow the jury to hear evidence regarding his acquittal on two counts in the first trial without being informed of the conviction on five counts. This objection is meritless. Federal Rule Of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Hill's having been found not guilty did not have any tendency to make the determination of any fact of consequence more or less probable. Therefore, it was irrelevant and inadmissable. Fed. R. Evid. 402 (1981).

(6) Just prior to the jury being sworn, Hill moved that I recuse myself because I had read the pre-sentence report in conjunction with sentencing after the first trial and therefore, a possibility of prejudice existed. N.T. 1-10. Noting that Hill's motion came at the eleventh

Collateral Estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation ..." United States v. Keller,624 F. 2d 1154, 1157 (3rd Cir. 1980), quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S. Ct. 645, 649, 58 L.Ed. 2d 552 (1979). In Ashe v. Swenson,397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed. 2d 469 (1970), the

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(6) cont'd
hour, I posited the motion was brought for delay, and that Hill had not stated how I was prejudiced against him. N.T. 1-11. Accordingly, I refused the motion. As grounds for his post-trial motions, Hill contends my refusal to disqualify myself was error. In Gregg v. United States, 394, U.S. 489, 89 S.Ct. 1134, 22 L.Ed. 2d 442 (1969), the petitioner sought reversal of his conviction because the trial judge allegedly read the pre-sentence report prior to the jury returning a verdict in violation of Fed. R. Crim. P. 32. Although refusing to reverse petitioner's conviction, the Court, citing Rule 32, noted that the trial judge should not read the presentence report prior to the time a

Supreme Court "found a constitutional basis for the collateral estopppel doctrine in the Fifth Amendment guarantee against double jeopardy."(7) United States v. Keller, supra,

(6) cont'd
guilty verdict is returned or a plea of guilty entered due to the possibility of prejudice. Gregg has been interpreted by some courts to require reassignment of a case over which a judge presided which has been reversed and remanded for a new trial. See United States v. Montecalvo , 533 F. 2d 1110 (9th Cir. 1976); United States v. Park, 521 F.2d 1381 (9th Cir. 1975). But see United States v. Arnett, 628 F.2d 1162 (9th Cir. 1980); United States v. Lyon, 588 F.2d 581 (5th Cir. 1978); United States v. Robin, 553 F.2d 8 (2d Cir. 1977); United States v. Bourque, 541 F. 2d 290 (1st Cir. 1976); United States v. Hernandez-vela, 553 F.2d 211 (5th Cir. 1976); O'Shea v. United States, 491 F 2d 774 (1st Cir. 1974); United States v. Small, 472 F. 2d 818 (3rd Cir. 1972); United States v. Ferretti, 508 F. Supp. 913 (E.D. Pa. 1981). Other courts, such as the Seventh Circuit, Eastern District of New York, and District of Connecticut, provide for the same result by local rule. The Third Circuit, however, has refused to adopt a per se rule of disqualification, and instead balances the possibility of prejudice with administrative convenience and expediency. United States v. Small, supra; United

"(A)s applied in criminal cases (collateral estoppel) has been used to bar not only re-prosecution,... but also evidence of crimes of which the defendant had been acquitted in prior prosecutions." United States v. Keller, 624 F. 2d at 1157.

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

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(6) cont'd
United States v. Ferretti, supra.
Here, Hill tried to enunciate his allegations of prejudice without success. Hill alleged I was prejudiced because I refused his motion to dismiss based on collateral estoppel and decided the motion was frivolous. N.T. 1-12 to 1-14. Finally, Hill admitted that he did not think I was prejudiced. N.T. 1-18. Therefore, I did not abuse my discretion in refusing Hill's motion for recusal.

(7) The Third Circuit differentiates between constitutional and doctrinal collateral estoppel. United States v. Keller, supra, 624 F.2d at 1159; United States v. Venable, 585 F.2d 71 (3rd Cir. 1978). See also United States v. Simon, 225 F. 2d 260 (3rd Cir. 1955); United States v. De Angelo, 138 F.2d 466 (3rd Cir. 1943).

Ashe v. Swenson, supra, 397 at 444, 90 S.Ct. at 1194,quoting Sealfon v. United States, 332 U.S. 575, 579, 68 S. Ct. 237,240. Evidence introduced in the trial leading to acquittal can be reintroduced in a second trial provided the court finds the fact "which defendant sought to bar was not previously determined in defendant's favor by the acquittal verdict." United States v. Keller, supra,624 F.2d at 1158-59 n.4; see also United States vs. Venable, supra; United States v. Castro-Castro, 464 F.2d 336 (9th Cir. 1972), cert. denied 410 U.S. 916, 93 S. Ct.971, 35 L.Ed.2d 278 (1973).

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(7) cont'd

In considering the effect of the constitutional doctrine of collateral estoppel as enunciated in Ashe on our earlier cases applying the collateral estoppel defense, we stated that Ashe would entirely bar a retrial, when collateral estoppel effect is given to facts established in favor of the defendant which are necessary to sustain a conviction in a second prosecution. Without the protection of the double jeopardy safeguard, the defendant would be vulnerable to multiple prosecutions by a strategic severance of re-

As I previously noted, Hill first moved to dismiss the indictment and when that motion was denied, moved to preclude the introduction of all evidence, advancing what was essentially the same collateral estoppel argument in support of both motions. In essence, he contended that the not guilty verdict on the conspiracy count proved he had been entrapped during the entire time period of the conspiracy which encompassed the distributions subject to retrial because each of them was

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(7) cont'd
lated counts. We indicated, however, that collateral estoppel in the broad scope previously enunciated in the earlier decisions of United States v. DeAngelo, 138 F. 2d 466 (3rd Cir. 1943), and United States v. Simon, 225 F. 2d 260 (3rd Cir. 1955), continues to apply in appropiate cases. '(The DeAngelo and Simon cases) retain their vitality however, to the extent that they would allow the defense of collateral estoppel to be raised in a second proceeding as to facts previously established but not necessary to sustain the conviction sought at retrial.' United States v. Keller, supra, quoting United States v. Venable, supra, 585 F. 2d at 76-78. Both facets of the doctrine are implicated here.

alleged as an overt act in the conspiracy count. Thus, Hill argued, no evidence could be received as to his criminal intent on the five distribution counts for which he was being tried because all issues pertaining to the conspiracy had been resolved in his favor by the jury at his first trial. Of course, Hill made this argument despite the fact that that jury had also found him guilty as to these same five distribution counts.

In view of Hill's assertion that collateral estoppel precludes the introduction of evidence as to matters decided at the first trial, I must examine the "pleadings, evidence, charge, and other relevant matter" to determine exactly what was decided there. If a rational jury at the first trial could have grounded its verdict upon an issue other than the one that Hill sought to foreclose at his second trial, that issue should not have been foreclosed. Ashe v. Swenson, supra.

Appendix "B"

It is apparent that an articulation of Hill's argument demonstrates fallacy. Hill wanted me to foreclose all evidence at the second trial, not just evidence as to those issues in his favor. What was foreclosed by the jury's verdict on the conspiracy count and the March 13, 1979, distribution count was a retrial of the essential elements of each. But that is all. The same jury which said he was not guilty on those two counts said he was guilty on the other five. Although it is true that entrapment was the sole basis of Hill's defense at the first trial, the not guilty verdicts on counts I and II did not establish that he was entrapped and thus foreclose that issue from consideration at retrial. First, I charged as to the essential elements of conspiracy and distribution, telling the jury it had to be satisfied as to the proof of each element of each offense beyond a reasonable doubt if there was to be a conviction. Thus, the jury

may simply have decided one or more elements of these two offenses had not been established. See e.g. United States v. Venable, supra, 585 F. 2d at 78. Secondly, the jury may have simply reached a compromise to resolve conflicting viewpoints in the jury room. Thirdly, it is quite possible that the jury concluded it would be unfair to convict Hill of a serious crime in view of the fact that only a small amount of heroin was given to Daniels on March 13 and no money was exchanged. The fourth possibility is that the jury concluded Hill was entrapped on March 13 simply because Daniels was the first to bring up the subject of heroin. The point is that it is impossible to say the jury's verdicts established Hill must have been entrapped as to Counts I and II -- much less can they form the basis for an extension of those verdicts to the other five counts. Therefore, no issue-preclusion at the second trial would have warranted.

Appendix "B"

Hill embroiders his collateral estoppel argument with a "once entrapped always entrapped" theory, that is,because the jury found him not guilty of distribution as to March 13, and because his only defense was entrapment, as a matter of law he could not be guilty of the subsequent distributions because the taint of the March 13 indictment carried over to them and meant he was entrapped on these subsequent incidents. No case was cited to support the theory nor did my research uncover any such ruling. Hill advances this argument in the face of the fact that in the first trial I specifically charged the jury that if it found entrapment as to one or more counts, it could consider whether that entrapment carried forward to subsequent dates. The guilty verdicts show the jury rejected Hill's "once entrapped, always entrapped" theory.

In United States v. Nelson, 559 F.

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2d. 714 (5th Cir. 1979), a trial for aiding and abetting, the Government was precluded from introducing evidence indicating defendant's participation in a conspiracy of which previously he was acquitted. Similarly, in United States v. Keller, supra, the Government was precluded from introducing evidence of subsequent crimes to prove prior predisposition to rebut defendant's anticipated entrapment defense where defendant had been acquitted of the subsequent crimes. In both cases, admission of such evidence was deemed to eviscerate the prior jury verdict and force re-litigation of issues determined favorable to the defendant. Keller, supra, 624 at 1159-60; Nelson, supra, 559 F. 2d at 717. That is simply not the case here. In his first trial, Hill was found guilty of the five counts subject to retrial. Allowing evidence in support of these five counts on retrial did not eviscerate the prior jury ver-

dicts as Hill contends. Accordingly, it was not error to allow evidence tending to prove them to be introduced in the second trial.(8) See United States v. Keller, supra; United States v. Venable, supra; United States v. Castro-Castro, supra.

Next, Hill argues that because he was acquitted of the March 13, 1979, distribution based on entrapment, the collateral estoppel doctrine prohibited the introduction of all evidence at the second trial of the events prior to March 14, 1979, the date of

(8) In fact, to preclude such evidence would eviscerate the jury verdict of guilty.
My ruling also was supported by Rules 105,401, and 402 of the Federal Rules of Evidence regarding limited admissibility of evidence. Rule 105 states in pertinent part:
> When evidence which is admissible... for one purpose but not admissible... for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.
Rule 401 defines relevant evidence and Rule 402 provides that with exceptions, relevant evidence is admissible.

the first distribution count at issue. Because I have determined that it is mere speculation to conclude the acquittal was based on entrapment, Hill's position has no merit. The only thing as to which evidence was admitted at the second trial which might have been resolved in Hill's favor at the first trial was the fact that he handed heroin to Daniels on March 13 -- and at his first trial, Hill admitted he had done that. Even though the jury at the second trial did not have before it a count in the bill of indictment relating to March 13, Hill's actions and his delivery of heroin on that date were relevant to the five counts which were before the jury. Federal Rules Of Evidence 404(b) permits evidence of other acts to show, inter alia, preparation, plan and intent. The March 13, 1979, distribution tended to show Hill's preparation for the larger distribution of March 14, 1979, and for that matter, all

subsequent larger distributions. It also tended to show a plan or scheme, that a person selling heroin in large quantities first offers a sample of his goods to a prospective purchaser. It was for these reasons that the March 13, 1979, distribution was admitted. If it was error to admit the fact of the March 13, 1979,distribution, of qhich Hill was acquitted, it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed 705 (1967). First, there was evidence, in the record, viewed in a light most favorable to the Government, to prove Hill's predisposition.(9) For example, Ian Daniels testified he witnessed Hill distribute cocaine on two prior occasions. N.T. 3-41 to 43; 4-35 to 39; 4-56 to 64. Addi-

(9) This finding coupled with my finding that it was not error to admit into evidence occurrences prior to March 13, 1979, rebuts Hill's argument that the government failed to prove predisposition.

the March 13, 1979, distribution and the events leading up to it, would have mislead the jury. The only evidence before the jury would have been admission of a casual acquaintance relationship between Hill and Daniels followed by the distribution of one ounce of heroin worth $6000. For these reasons, Hill's post-trial motions on the collateral estoppel grounds are meritless.

Hill also seeks judgment of acquittal or a new trial based on my refusal to allow inquiry into charges of misconduct against Agent Richard Fekete of DEA, who directed the Hill investigation. Evidently, Agent Fekete's conduct in an investigation unrelated to Hill was challenged, and intra-agency

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(10) Cont'd
quest for heroin. Rather, he responded quickly and affirmatively. Also, Hill repeatedly arranged and negotiated heroin sales.

tionally, Hill's use of drugs culture terminology and the split responsibilities of Hill and Newton in selling the heroin (one handled only money and the other only heroin) tended to prove Hill;s prior involvement in the distribution of heroin.[10] Second, to exclude

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(10) Hill also argues that I erred in permitting agents to so testify because they were, in effect, testifying as experts. Rule 702 of the Federal Rules Of Evidence states in pertinent part:

> If ... specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

First, DEA agents certainly possess specialized knowledge of the unique habits and language usage of drug dealers. In fact, I can think of no more qualified experts in drug counterculture than DEA agents. Second, the testimony of the agents assisted the jury to understand the evidence and determine a fact in issue. A jury cannot be expected to know or understand the habits and lauguage of people involved in illegal drugs. Without the testimony of the agents, the jury may not have known that Hills' conduct and word usage were relevant to his predisposition to sell heroin. Accordingly, Hill's argument is without merit. Additionally, the record is replete with facts demonstrating Hills' willingness and voluntary participation in distributions of heroin. For example, Hill did not resist Daniels' first re-

(DEA) and criminal charges were lodged against him. Although Agent Fekete was cleared of all wrongdoing, Hill argued that the charges of misconduct were relevant to Fekete's credibility. Contrariwise, the Government argued the nature of the charges said nothing about Agent Fekete's character for truthfulness or untruthfulness, particularly because the charges had been dropped or the issue resolved in Fekete's favor. Thus, the evidence was irrelevant. Rather than rely on the Government's representations, I permitted Hill to cross examine Agent Fekete regarding the charges outside the presence of the jury. (11) N.T. 6-31 to 6-36. Agent Fekete testified he was charged with unprofessional conduct by the DEA in November 1979. Regarding the same incident, he was

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(11) The government filed a motion in limine asking that I prohibit Hill from inquiring into the charges against Fekete in the jury's presence.

criminally charged with disorderly person, trespass, and false imprisonment. Fekete further testified that he "was acquitted... (of the criminal charges)and ... completely reinstated by the Merit System Protection Board and found to have been the subject of improper prosecution by the Drug Enforcement Administration." N.T. 6-33. Having determined the evidence was not probative of Agent Fekete's credibility, I excluded it. N.T. 6-37. My ruling was correct.

Federal Rule of Evidence 608(b) states in pertinent part:

> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsix evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, ...

The first step in a 608(b) analysis is whether the specific conduct is probative of the

witness' character for truthfulness or untruthfulness. Next, the court must decide whether the probative value of the evidence is substantially outweighed by unfair prejudice. See Fed. R. Evid. 403 (1981). United States v. Bocra, 623 F. 2d 281, 288(3rd Cir.) cert. denied, 449 U.S. 875, 101 S.Ct. 217, 66 L. Ed. 2nd 96 (1980); United States v. Rios Ruiz, 579 F. 2d 670, 674 (1st Cir.1978). Because "rule 608(b) is intended to be restrictive ... the inquiry on cross-examination should be limited to ... specific modes of conduct which are generally agreed to indicate a lack of truthfulness." United States v. Bocra, supra, quoting 3 Weinstein's Evidence 608(05) at 608-33 (1979). See Gordon v. United States, 383 F. 2d 936, 940 (D.C. Cir.), cert. denied, 390 U.S. 1029, 88 S.Ct. 1421, 20 L. Ed. 2nd 287 (1968).

The charges against Agent Fekete were disorderly person, trespass, and false imprisonment. Simply stated, they are in no

way probative of Agent Fekete's character for truthfulness or untruthfulness and therefore, do not fall within rule 608(b). Furthermore, because Fekete was acquitted, undoubtedly I would have found the probativeness of the evidence substantially outweighed by its prejudice to the Government.[12] Accordingly, Hill's motions on this ground are meritless.[13]

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(12) At trial, I stated that Fekete's acquittal of the charges made them of less probative value. N.T. 6-37.

(13) Hill assigns error to several trial rulings. Each of Hills' allegations is without merit and will be discussed briefly. During the second day of trial, Hill moved that I sequester all government witnesses. See Fed. R. Evid. 615 (1981). Because the government stated the case agent would be operating a tape recorder and helping with the evidence and prior transcripts, I excluded the case agent from my sequestration order. N.T. 2-34. My ruling did not constitute error. United States v. Strauss, 473 F. 2d 1262,1263 (3rd Cir. 1973). Hill also objected to the use of a tape recording of a conversation of his with Miles Edwards, Jr., of the Philadelphia Police Department on April 17, 1979. N.T. 3-12 to 3-16; 5-11 to 5-14. Because the go-

As yet another ground for acquittal or a new trial, Hill claims I coerced the jury by directing them to deliberate further after one juror, while announcing her verdict, stated Hill was not guilty on four of five distribution counts. After a few minutes of further deliberation, the jury returned a verdict of guilty on all counts. Hill contends I should have allowed the deputy clerk to continue polling the jury, and then declared a mistrial. I disagree.

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(13) Cont'd
vernment had not produced the recording during the first trial, Hill argued the recording could not be used now due to double jeopardy and collateral estoppel. He also alleged government misconduct in withholding the recording from him at the first trial. Neither argument has merit. First, the recording did not relate solely to the conspiracy charge or the March 13, 1979, distribution count of which Hill was acquitted at the first trial. Second, Hill could not point to any prejudice suffered by virtue of not knowing about the recording at the first trial. Finally, the government stated the recording was first discovered while preparing for the second trial, and immediately upon discovery,

After approximately 2 1/2 hours of deliberation, the jury notified the marshall it had reached a verdict. The foreman announced the jury's verdict as guilty on all counts. During the jury poll, however, Juror 4 stated Hill was not guilty on four of the five distribution counts. The colloquy with Juror 4 was as follows:

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(13) Cont'd
a transcript was made and that, along with the recording, was given to Hill five weeks prior to the second trial. Under the circumstances, the government's actions neither amounted to misconduct nor prejudiced Hill. As yet another assignment of error, Hill contends I restricted his cross-examination of the "background" of Ian Daniels, the government informant. I must refuse relief on this ground for the simple reason that I do not know the instance to which Hill alleges error. Daniels was cross-examined for a day and a half. During cross-examination, there were numerous instances where questions or lines of inquiry were not permitted. Part of Hill's burden here is to raise an argument to which the Government can respond and on which the Court can rule. Hill obviously has failed in meeting his burden in this respect. Finally, Hill alleges error was committed because I allowed perjured testimony by government witnesses. This claim borders on the absurd. First, all government witnesses

As to March the 14th, 1979, do you find the defendant guilty or not guilty?

JUROR JAMES: Guilty.

THE DEPUTY CLERK: As to March the 29th, 1979, do you find the defendant guilty or not guilty?

JUROR JAMES: Not guilty.

THE COURT: Did you say not guilty?

JUROR JAMES: Yes.

THE DEPUTY CLERK: As to April 23, 1979, do you find the defendant guilty or not guilty?

JUROR JAMES: Not guilty.

THE DEPUTY CLERK: As to June the 12th, 1979, do you find the defendant guilty or not guilty?

JUROR JAMES: Not guilty.

THE DEPUTY CLERK: As to June the 18th, 1979, do you find the defendant guilty or not guilty?

JUROR JAMES: Not guilty.

THE COURT: Miss James, what was your answer so far as March the 14th was concerned?

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(13) Cont'd

were subject to cross-examination. Any alleged perjurious statements could have been highlighted by Hill at that time. Second, all transcripts from the first trial were available for use in impeaching government witnesses.

Appendix "B"

JUROR JAMES: I beg your pardon ?
THE COURT: As to March 14th what was your answer ?
JUROR JAMES: Not Guilty.
THE COURT: Memners of the jury, I'm going to ask that you resume your deliberations.
JUROR JAMES: Wait a minute. March 14th, the first one ?
THE COURT: Yes.
JUROR JAMES: Guilty.
THE COURT: But did you say not guilty as to all the others ?
(No response)
I'm going to ask you to resume your deliberations because its apparent you don't have a unanimous verdict at this point, so I will ask you please retire and resume your deliberations.

N.T. 8-58 to 8-60.

Federal Rule Of Criminal Procedure 31 (d) states in pertinent part that "(i)f upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged. " Fed. R. Crim. Pro. 31(d) (1981). Rule 31(d) gives the trial judge discretion to decide which of the two available courses to take. It is not inherently coercive to direct the

jury to deliberate further. United States v. Freedson, 608 F. 2d 739, 741 (9th Cir. 1979).

> Generally, in the cases upholding verdicts as not coerced, the trial courts have questioned the polled juror to resolve any questions and then returned the juries for further deliberations. In the cases finding verdicts to be coerced, the trial courts had demanded in court categorical responses from jurors who expressed reservations or recalcitrance when polled, instead of returning the juries for deliberations.

Amos v. United States, 496 F.2d 1269, 1272-73 n. 3 (8thCir.), cert. denied, 419 U.S. 896, 95 S. Ct. 174, 42 L.Ed. 2d 140 (1974). Compare cases finding coercion, United States v. Sexton, 456 F. 2d 961 (5th Cir. 1972) and United States v. McCoy, 429 F. 2d 739 (D.C. Cir. 1970) with United States v. Morris, 612 F. 2d 483 (10th Cir. 1979); United States v. Freedson, supra; United States v. Brooks, 420 F. 2d 1350 (D.C. Cir. 1969); Williams v. United States, 419 F. 2d 740(D.C. Cir. 1969); and United States v. Lockhardt, 366 F. Supp.

843 (E.D. Pa. 1973), aff'd mem., 495 F. 2d 1369 (3rd Cir. 1974). It is evident from the colloquy here that Juror 4 was confused. Rather than demand Juror 4 clarify her answer, I merely asked her to repeat the verdict. No further charge was given and instead, I directed the jury to retire to deliberate further. Because there was no coercive colloquy with Juror 4, no error was committed.(14)

CONCLUSION

For the above reasons, Hill's post-trial motions will be refused.

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(14) Hill claims I erred in instructing the jury as to entrapment and aiding and abetting. Both claims are groundless and will be discussed only briefly. As to aiding and abetting, Hill merely contends I "improperly instructed and misled the jury as to law of aiding and abetting as it applies to this case." Supplemental Reasons for Motions of Acquittal of (sic) New Trial,Docket Entry 80. Because I instructed the jury using the language of the statute and gave three simple examples of how a crime can be committed, Hill's claim has no merit. N.T. 8-26 to 8-28; 8-50 to 8-51. See 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions 12.01 - 12.03 (3d ed. 1977) (Cum. Supp.1982). Hill

(14) cont'd
also contends my entrapment charge did not make clear the time when his predisposition had to be proved in relation to his prior acquittal on entrapment. First, the charge was clear that the government was required to prove Hill's predisposition to distribute heroin beyond a reasonable doubt only if there was evidence of unlawful inducement. N.T. 8-31 to 8-37.
Second, as I discussed earlier, it is pure speculation to state Hill was acquitted of conspiracy and on distribution count at the first trial based on entrapment. See pp. 8 to 11 supra. Therefore, Hill's assignment of error has no merit.

Appendix "B"

OPINION OF THE COURT

WEBER, Chief District Judge

This matter is before the original panel of the Court on a grant of rehearing from its decision of November 25, 1980.

This is an appeal from a criminal conviction on five counts of distribution of narcotics. Appellant contended at trial that a government informant had induced him to arrange narcotics sales to two government agents. This appeal raises the question of admissibility and proper use of expert psychological testimony in an entrapment defense to establish a defendant's unique susceptibility to inducement. Because the District Court misapprehended the nature of the offer of proof and applied too restrictive a view of such offered evidence resulting in the practical exclusion of the testimony of appellant's proffered expert witness, we reverse and remand for a new trial.

Appellant, an individual of alleged subnormal intelligence, was employed as a clothing salesman at Krass Bros. in Philadelphia. In February of 1979, he was approached by Ian Daniels, an FBI informant, who inquired about making a heroin buy and locating a source. Hill rebuffed Daniels' initial requests, but the informant persisted in making additional contacts and requests over the following month, and Hill relented.

On March 13, 1979, Daniels and a federal agent made a heroin purchase from Leonard Newton, an acquaintance of Hill. Appellant arranged, and was present at, the sale. Additional sales to government agents were arranged by Hill and made by the source, Newton, on March 14, and 29, April 23, and June 12 and 18, 1979.

Appellant was indicted on one count of conspiracy and six counts of distribution of heroin. Hill's only defense was entrapment, arguing that the informant Daniels had induced him to procure drugs for the government agent.

This defense requires admission of guilt of the crime charged and all of its elements, including the required mental state. United States v. Watson, 489 F.2d 504(3rd Cir. 1973).

Following its deliberations, and supplemental instructions from the court, the jury returned with a verdict of not guilty on the conspiracy count and the first distribution count, but guilty on the remaining five distribution counts. The jury evidently accepted the defense of entrapment as to the conspiracy count and to the first substantive count. The jury was evidently concerned about the entrapment defense because they returned to ask the court two questions, interpreted by the trial judge as asking essentially whether if they found that there was entrapment as to any one count there was of necessity entrapment as to all the other counts. The court's additional instructions were that if the government had not carried its burden with respect to a particular count, the jury must consider the other counts to determine whether this was a continuing course of conduct, or whether the defendant acted for other reasons than entrapment with respect to the other counts; and that a finding of entrapment as to one count did not necessarily require a finding of entrapment as to any other count.

During trial, the District Court refused to allow appellant to call an expert witness, a clinical psychologist, to testify to appellant's psychological characteristics, subnormal intelligence, and resultant susceptibility to persuasion and psychological pressure until after the defendant had testified.

In addition to barring the witness' im-

mediate testimony the effect of the ruling was to impose a condition that the defendant waive his constitutional right not to testify.

Appellant contends that the District Court abused its discretion in imposing such a condition on the proffered testimony of the psychologist. The District Court concluded that because the expert witness had not heard the testimony of the informant or the defendant, no proper foundation had been laid for his testimony.

The offer of proof was somewhat confusing and may have led to its being misapprehended by the trial judge. It and the colloquy attending it are set forth in the record at transcript pages 6-3 to 6-12(Appellant's Appendix 4A to 13A). The United States objected to the production of the witness under Fed. R. Crim. P. 12.2(b) for lack of the required notice. The United States also objected on the grounds of relevancy. The court's ruling, sustaining the government's objection, was based on the grounds that there was no foundation laid as to any opinion which the doctor could give as to the nature of any assertions made to Mr. Hill by the witness Daniels. The doctor was not in the courtroom when Mr. Daniels testified, and therefore would not be in a position to state anything, or give any opinion about the effect of whatever Mr. Daniels may have said to Mr. Hill. (Tr. p. 6-6). The court further added a condition that if the doctor remained in court and Mr. Hill testified, then the doctor might have some basis for examining testimony. "But right now he doesn't have any basis and I will refuse to permit the doctor to testify based on the present status of the record." (Tr. p. 6-9).

Thus we see that the trial judge did not absolutely bar the testimony proffered, but imposed a condition on it that the defendant Hill must testify first and the doctor remain in the courtroom to hear this testimony. The

doctor who had been present in the courtroom for two days could not wait longer and departed. Hill did testify in his own defense.

The defendant offered the testimony of the clinical psychologist as to three matters:

(a) A complete profile from the records and tests of defendant which were examined by the witness;

(b) An opinion by the witness as to defendant's characteristics of susceptibility;

(c) An opinion by the witness as to the effect of the government informant's skill and cunning upon defendant's susceptibility.

The second and third items of testimony are not clearly distinguished in the offer and may well have contributed to the court's misapprehension of the nature of the offer. The trial court could properly have excluded testimony concerning the "skill and cunning" of the government informant because the expert had no opportunity to observe or evaluate this informant, either prior to trial or at trial. United States v. Caldwell, 543F.2d 1333(D.C. Cir. 1974).

Federal Rules of Evidence 702 and 703 provide:

Rule 702.
TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703.
BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hear-

ing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

There is no requirement that the facts necessary to the foundation of the expert's testimony must be perceived by him at trial. He may testify to relevant matters based on facts in evidence or those made known to him prior to trial. United States v. Smith, 519 F.2d 516, 521(9th Cir. 1975); Jenkins v. United States, 307 F.2d 637(D.C. Cir. 1962).

The expert was offered to give testimony as to tests and profiles compiled from his personal examination of the defendant. These are facts derived from first hand knowledge and are relevant to the required element of predisposition of the defendant. The expert may testify as to these without giving an opinion, leaving the inference to be drawn by the trier of fact (See Advisory Committee Notes on Rule 702). Such testimony is admissible under Rules 702 and 703 without the imposition of the condition imposed by the trial judge.

The exclusion of the expert's opinion as to defendant's susceptibility was likewise improper under Rule 703 because there is no requirement that the opinion be based on the evidence at the trial. Rule 703 allows opinion testimony on facts or data perceived or made known to the witness at or before the hearing.

The Advisory Committee Notes on Rule 703 identify three bases for expert opinions:

(1) Firsthand observation by a witness;
(2) Presentation at trial;
(3) Data compiled by others and presented to the expert out of court.

While this witness was not offered to give an opinion based on facts presented at trial, he was prepared to meet the other two bases.

Testimony by an expert concerning a de-

fendant's susceptibility to influence may be relevant to an entrapment defense. United States v. Benveniste, 564 F.2d 335.339(9th Cir. 1977). An expert's opinion, based on observation, psychological profiles, intelligence tests, and other assorted data, may aid the jury in its determination of the crucial issues of inducement and predisposition. This is the purpose ascribed to expert testimony by Federal Rules of Evidence 702, and it appears most applicable to the instant case. A jury may not be able to properly evaluate the effect of appellant's subnormal intelligence and psychological characteristics on the existence of inducement or predisposition without the considered opinion of an expert.

Accordingly, if the expert can reach a conclusion, based on an adequate factual foundation, that the appellant, because of his alleged subnormal intelligence and psychological profile, is more susceptible and easily influenced by the urgings and inducements of other persons, such testimony must be admitted as relevant to the issues of inducement and predisposition.

We also believe that the proffered testimony was admissible on an entirely different basis, and free of the restrictive conditions which the trial judge imposed on its admissibility here:

FEDERAL RULES OF EVIDENCE

Rule 405.

METHODS OF PROVING CHARACTER

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

As noted in United States v. William Curtis, III.644 F.2d 263(3rd Cir. 1981), the new Federal Rules of Evidence 405(a) now permit two kinds of character evidence, now allowing

testimony by an expert witness on traits of character which may be substantively relevant. The character trait of susceptibility to inducement is an element of the defense offered here, the burden of negating this resting on the government. Thus, the exclusion of expert opinion testimony in an entrapment defense of defendant's unusual susceptibility to suggestion was improper. In United States v. Staggs, 553 F.2d 1073(7th Cir. 1977), the exclusion of testimony of a psychologist as to a trait of character relevant to lack of intent was held error.

The government also contends that the expert's testimony was properly excluded because appellant failed to comply with Fed. R Crim. P. 12.2(b) by not notifying the Government of his intention to call an expert witness to testify to appellant's mental state. The test of Rule 12.2(b) does not specifically address this issue with relation to an entrapment defense, stating only that:

> "(I)f a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the Government in writing of such intention and file a copy of such notice with the Clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate."

Sanctions for the violation of this rule are provided in subsection (d), which states:

> "(I)f there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this

rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state"

While the phrase "expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether (the defendant) had the mental state required for the offense charged"may be broad enough to encompass expert testimony on the defense of entrapment, the legislative history and Advisory Committee notes concerning Rule 12.2 (b) do not discuss its applicability to expert psychiatric testimony on entrapment.

The question of specific application of Rule 12.2(b) to an entrapment defense has never been ruled upon.

Two cases have discussed, albeit breifly, the applicability of this rule to a defense of entrapment. In United States v. Perl, 584 F.2d 1316(4th Cir. 1978), the defendant, a member of the Jewish Defense League, was charged with wilfully conspiring to destroy property utilized by foreign officials. At trial Perl relied primarily upon an entrapment defense. On appeal Perl claimed that the court erred in excluding certain expert testimony on the defense of entrapment. With respect to the exclusion of expert testimony on the defense of entrapment the court concluded that it need not reach the question of whether this testimony fell within the scope of Rule 12.2(b). In the court's opinion, even if this testimony had been admitted, no defense of entrapment could have been shown since no government agents took any part in the conspiracy.

In United States v. Alberico, 453 F.Supp. 178(D.C. Col. 1977), the court recites that the criminal defendant filed a notice pursuant to Rule 12.2 of his intent to offer psychiatric testimony in support of an entrapment defense. The court did not rule on the question of whether or not such a notice was required however.

In other cases, however, courts have

applied Rule 12.2(b) in requiring notice of a variety of defenses relating to the mental state of the defendant. For example, in United States v. Hearst, 412 F.Supp. 863(N.D. Cal. 1975), the court required defense counsel to provide timely notice of its intention to rely upon a "brain washing" defense. In reaching this conclusion the court expressly relied on Rule 12.2(b).

In United States v. Olsen, 576 F.2d 1267 (8th Cir. 1978), the Court of Appeals in an income tax case concluded that Rule 12.2(b) would require notice of expert testimony on a defense of alcoholism when that defense is used to negate the element of intent necessary for the crime.

Finally, in United States v. Staggs, supra, the court held that Rule 12.2(b) notice was required for psychiatric testimony dealing with the question of whether or not the defendant was capable of forming the specific intent required for the crime charged. The court in Staggs, however, indicated that failure to abide by the provisions of Rule 12.2(b) would not automatically lead to exclusion of the expert testimony. The court indicated that it was within the discretion of the trial judge to exclude this evidence. The court characterized that sanction as "drastic" and indicated that the district court should delay trial rather than bar the production of this evidence.

There being no clear application of Rule 12.2(b) to an entrapment defense, we face the question of whether the language of Rule 12.2 (b) gives fair notice that it will be applied to the characteristic of susceptibility in an entrapment defense. An entrapment defense was distinguished from an insanity defense in United States v. Mosley, 496 F.2d 1012, 1017 (5th Cir. 1974), where the court held that a waiver of an insanity defense does not constitute a waiver of an entrapment defense.

Given the lack of a clear indication that

Rule 12.2(b) will apply to an entrapment defense, we find it an insufficient basis to exclude the proffered testimony in this case. Moreover, under the circumstances of this case, we find this application inappropriate. Appointed counsel for this indigent defendant learned of this evidence during the course of trial. He took immediate steps to procure an expert to conduct an examination and notified the United States Attorney of his identity. There was no way in which he could have complied fully with the rule before the offer of testimony. He had the witness available in court for two days. Under the court's ruling he could not present the testimony until after defendant had testified. He could not do it then because the witness had departed. Under these circumstances we do not believe that a rigid application of the sanction of exclusion was required.

Because we condlude that the District Court's trial rulings necessitate a new trial, we do not reach any of appellant's other contentions.

For the reasons stated above, we conclude that the District Court imposed an impermissible condition by refusing to admit relevant testimony by the appellant's expert witness, and the judgment of the District Court will be reversed and the case remanded for a new trial in accordance with this opinion.

Appendix "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL NO.
: 79-161
vs. :
:
PAUL HILL

OPINION

DITTER, J. December 26, 1979

Paul Hill was charged with distributing heroin on six specific dates between March 13 and June 18, 1979, and with conspiracy to distribute heroin. He was found not guilty of Count I, conspiracy, and not guilty of Count II, which referred to the first date of distribution, March 13, 1979. Defendant did not deny those acts which would constitute the offense, but claimed that he was entrapped by government agents. Presently before the court are defendant's motion for judgment of acquittal or for a new trial. I find no merit in his contentions and for the reasons which follow, his motions must be refused.

Ian Daniels testified that he was paid to provide information to the government about traffickers in drugs. Hill and Daniels were casual acquaintances - so casual, in fact, that Hill could not remember Daniels' name when Daniels contacted him at the men's clothing store where Hill worked. According to his own testimony, Hill immediately asked Daniels for a marijuana cigarette. Daniels then told Hill he was interested in buying heroin and asked Hill to help him obtain it. Hill testified that although he had smoked marijuana and taken cocaine, he had never used heroin nor had he ever been involved in its sale.

According to the defendant, there were three, four, or five occasions in the next few days when he saw Daniels and in addition, there were three telephone conversations. In these contacts, Hill said Daniels tried to get him to supply heroin. Hill became impressed by Daniels' need to obtain the heroin and as a result, contacted Leonard

Newton (his co-defendant) whom he knew to be a dealer in illegal drugs. Hill explained that Newton was a good customer of his at the clothing store, one who spent a lot of money, drove a big car, and had a nice apartment which Hill had visited on several occasions. More significantly, Hill knew that Newton dealt in both marijuana and cocaine. In view of Daniels' need, Hill decided to get Newton and Daniels together as a favor. He told Newton about Daniels. Newton said he felt he could supply Daniels' need and gave Hill a small quantity of heroin as a sample which Hill passed on to Daniels.

Daniels then introduced Hill to Jerome Harris, and later to Miles Edwards, both of whom were undercover police officers working with the Drug Enforcement Administration. Subsequently, Edwards explained to Hill that although Harris and Daniels might make minor purchases for him, he, Edwards, was the one who would handle large transactions. There were five ensuing purchases, the largest on

June 18, being for $24,000, immediately after which Hill and Newton were arrested. As time passed, Daniels' role in contacts with Hill had become less frequent, and Daniels was not even present for the distributions which took place on April 23, June 12, and June 13. In fact, Hill even admitted telling Edwards not to bring Daniels to Newton's apartment any more -- apparently because the apartment had been raided and Newton thought that Daniels might have been responsible for tipping off the authorities. On the other hand, Hill took an active role in each of the sales.

1. Whether or not entrapment on the first date of distribution so pervaded the other incidents was a jury question.

Hill first contends that the not guilty verdict on Count II can only be interpreted as a finding that he was entrapped into making the first heroin distribution. It follows, he maintains, that the taint of entrapment so pervades the other five transactions that he is entitled to a judgment of acquittal as to them. I disagree.

The focal point of the entrapment offense is not the nature of the government agent's conduct, but instead, the predisposition of the defendant to commit the crime with which he is charged. United States v. Russell, 411, 36 L Ed. 2d 366, 371 (1973). I told the jury it would have to consider the evidence as to each count separately, and that it would also have to consider whether or not the pressures exerted by Daniels, which only concerned the obtaining of the initial sample, carried over from the first distribution to the second, or to the third, and so on. In short, I submitted to the jury the question as to whether or not the conduct of the government informant, Daniels, if it amounted to entrapment, so pervaded the subsequent events as to make them all a part of the first and thus illegal. In United States v. West, 511 F. 2d 1083 (3d Cir. 1975), an informant provided West with drugs which in turn were purchased by a government agent. Thus, the government provided the drugs which the defendant was accused of selling. The Court of Appeals heard that two counts of distribution could not stand under these circum-

stances.(1) However, the government's involvement with the defendant did not preclude his being found guilty on a third count of possessing drugs not supplied by the government.

In the instant case, the entrapment issue was fully and fairly submitted to the jury as to each count. While it is true that the logical interpretation of the finding of not guilty on Count II is to sustain the entrapment defense as to that count, Hill's own explanation of his actions after March 13 established beyond any doubt his predisposition to sell drugs on the subsequent occasions.

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(1) In Hampton v. United States, 425 U.S. 484, 96 S. Ct. 1646 (1976), the Supreme Court held that even though a government agent supplied the drugs which the defendant sold to another government agent, defendant's conviction could stand if he was predisposed to commit the crime. In West, which predated Hampton, the court concluded that West was not predisposed to commit the crimes charged in the first two counts.

Hill and Daniels were only casual acquaintances. On the other hand, Hill and Newton were close friends. Hill had been a guest at Newton's apartment on several occasions. After the contact with Officers Harris and Edwards was established, Newton paid Hill - and as Hill said, this money was a factor in his continued involvement. Finally, there was Hill's active role in the sales. He was not a mere conduit or passive passer - Hill made the arrangements, quoted prices, explained quantity discounts, related the number of cuts which the heroin would take, counted the money for Newton, made telephone calls to Newton to set up the actual meeting points, and in general, acted for and with Newton in the distributions that were made.

After the first distribution - the sample which Hill obtained from his co-defendant Newton - Daniels had a limited and decreasing relationship with Hill. He had introduced Hill to Edwards and Harris. It was to them that Hill turned and it was to them that he sold. The rewards - money - came from Newton.

Hill's position is basic: once entrapped, always entrapped, no matter how much time passes and no matter how changing circumstances may alter an initial relationship.(2) Hill presented no citation that this is the law nor suggested any reason why it should be the law. I could find no case to support that idea and no policy reason occurs to me as to why, under the facts here, the limited role played by Daniels should shield Hill from responsibility for his part in the subsequent events. Under the rule of United States v. Russell, supra, the focus of inquiry is on the

(2) Although Hill cites Sherman v. United States, 356 U.S. 369, 78 S. Ct. 819, __ L. Ed. __ (1958), to support his contention, it does not do so. In Sherman, the later sales on which the convictions were based "... were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement." 356 U.S. at 374, 78 S. Ct. at 822. Whether or not that was the fact in the instant case was a matter which I left to the jury and which it decided against Hill.

defendant's predisposition, not the conduct of the government agent. Here the defendant did more and more, the informer less and less. The issue of the defendant's predisposition was for the jury.

After deliberating several hours, the jury returned with two questions, one of which asked, "If the defendant was entrapped could the defendant be not guilty of Counts II to VII (distribution) if entrapment was involved in any other count?" I stated to the jury that I interpreted their question to be really one: If there was entrapment as to any one count, does that mean that there was of necessity entrapment as to all of the other counts? The jury affirmed that this was the question it was asking.

I then repeated to the jury that if it concluded the government had not carried its burden to prove that the defendant had not been entrapped as to the first date, March 13, it would then have to consider the evidence as to each of the other counts to see whether

the activity, threats, persuasion, cajolry, promises, flattery, or whatever it was that constituted entrapment as it referred to the first purported distribution, carried over to the next time and the time thereafter and the time after that. I said it did not follow as a matter of law that this conduct had to carry over, but that the jury could find that it did so. I also pointed out that that the jury would not have to reach that conclusion because it could take into account, for example, that after the first transaction, Hill had received money from his co-defendant Newton. I also told the jury that in considering the entrapment defense, it could consider not only what Daniels had said to Hill prior to March 13 but that which each of the other officers had said to Hill at any time thereafter.

These instructions were an appropriate response to the jury's question, and as previously pointed out, a correct statement of the law under the circumstances of this case.

Appendix "D"

2. No foundation was laid for the presentation of expert testimony.

The defendant also contends that I improperly excluded the testimony of his expert witness.

Just prior to the government's resting its case, the defendant sought to present evidence from Dr. Milton Brutten, a psychologist. Dr. Brutten had reviewed the intellectual and public school background of the defendant (who was then 33 years of age) and had also administered tests to the defendant. The defense was offering Dr. Brutten to testify as to the defendant's intellectual capacity to resist the pressure or urging of a skillful undercover informant, here, Daniels. Originally counsel for the defendant believed that Dr. Brutten could not appear on any other occasion. Having learned that the prosecution's case would probably finish within a short time, I interrogated the doctor and found that he could be in court the next morning. Thereafter, the govern-

ment rested and the defense called four brief witnesses, but not the defendant.

The following day the doctor appeared and was offered as a witness. However, he had not been present to hear Daniels testify, had never seen Daniels, had never had Daniels tested, and had not reviewed the testimony which Daniels had given.The defendant had not as yet been called to the stand and therefore the doctor obviously had not heard his testimony, nor could he know how Hill would respond to cross examination. I suggested to counsel for the defendant that Dr. Brutten remain in the courtroom so that he could at least hear Hill describe his various encounters with Daniels. Dr. Brutten, however, had other appointments and I was told he could not remain. I then refused to permit the doctor to be called to the stand.

Primarily, my ruling was based on the complete absence of any foundation for the testimony. Having heard neither the allegedly "cunning and skillful" entrapper nor the

version of the facts given by the allegedly mentally disabled defendant, there was no basis on which the doctor could provide an expert opinion. Counsel for the defendant proposed to provide a hypothetical question which in effect would have asked the doctor to give his opinion as to whether the defendant could have resisted the persuasion of a skillful and cunning man like Daniels. I refused the offer because Dr. Brutten had never seen Daniels nor did he know what Daniels had said. To have allowed Dr. Brutten to testify as to Hill's ability to resist Daniels' importuning would have required not only a knowledge of Hill, but also an equivalent knowledge of Daniels' mental ability. Dr. Brutten's complete ignorance as to Daniels could not have been overcome by Daniels' being characterized as skilled, cunning, communicative, or in any other way for the purpose of a hypothetical question. I did not refuse to permit the doctor to testify -- I only insisted that there be some sort of minimal foundation for him to do so.

Appendix "D"

There was a second reason why Dr. Brutten's testimony was excludable. Counsel for the defendant made it very clear that he considered a crucial part of the entrapment defense to be the weakness of mind of the defendant and that Dr. Brutten's testimony would go right to the heart of that particular aspect of the case. At another point, counsel said that the doctor would testify in the terms of the defendant's intelligence capacity, inclinations, weaknesses, or strength of mind, all of which he felt were relevant in the entrapment field.

Fed. R. Crim. P. No. 12.2, Notice of Defense Based upon Mental Condition, provides in part:

> (b) ... If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had mental state required for the offense charged, he shall, within the time provided for the filing of pre-trial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention... (emphasis supplied)
>
> (c) ...
>
> (d) ... If there is a failure to give notice when required by subdivision

> (b) of this rule ... the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state.

I conclude that predisposition to sell heroin is a mental condition which bears upon the issue of whether the defendant had the mental state (3) required for the offense charged here and thus notice of Dr. Brutten's testimony was required under Rule 12.2. There was no notice in this case. The government had only learned about the possibility of Dr. Brutten's being called the day before. Dr. Brutten testified that he was busy, that his appointments were booked hour by hour, two and three weeks in advance. and that it was difficult to change these appointments. I was not asked to allow him to testify at some other time but then and only then. Had I permitted him to do so, it would not only have meant that the government would not have been equipped to cross examine, but also, any expert called by the government would not have had a chance to hear Daniels, Hill, or Dr. Brutten.

In addition, the government would have been deprived of any opportunity to investigate other aspects of Hill's life and work which might bear on his mental state to obtain any other form of rebuttal testimony on that issue. Havingconsidered the alternative, I concluded that the failure of the defense to comply with Rule 12.2 made the exclusion of Dr. Brutten's testimony mandatory.

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(3) Plainly "mental state", the term used in Rule 12.2 (b) is broader than insanity, the term used in 12.2 (a). Rule 12.2 has been held to apply to a defendant's "nonagressive" nature, United States v. Staggs, 553 F. 2d 1073 (7th Cir. 1977), and to a mental irresponsibility caused by alcohol, United States v. Olson, 576 F. 2d 1267 (8th Cir. 1978).

3. Defendant's Remaining Arguments

Defendant contends that the example which I used to illustrate circumstantial evidence was prejudicial in light of the government's closing to the jury.(4) Counsel took no exception to either or both at the time, a and there is no merit in this argument. In addition, he maintains that the prosecutor's comment that the heroin in question had a street value of a quarter of a million dollars was inflammatory. I disagree. The jury had heard that the undercover officers paid almost $39, 000 for heroin of a sufficient purity to allow an average of eight "cuts" or an expansion by a factor of eight before it would be sold to the ultimate user. In view of the drug's high purity and the dollar amounts involved in these purchases, the prosecutor's comment was fair argument. Moreover, it must be remembered that the jury spent considerable time in deliberation, asked a question, and found Hill not guilty on two counts of the

indictment. Plainly this evidence of careful, reasoned deliberation shows the jury was not prejudiced against Hill.

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(4) Examples may be used to explain abstract legal concepts: United States v. Armedo - Sarmiento, 545 F. 2d 785 (2d Cir. 1976) cert. denied, 430 U.S. 917 (1977). I told the jury that if late one evening in a dim light I had seen a small figure in our kitchen and had concluded it was my son, Bobby, it would be an example of direct evidence. If later I went to the bedroom and saw that Bobby's twin, David, had cookie crumbs around his mouth and a piece of cookie on his pillow, from that circumstantial evidence I might conclude that it was David whom I had seen in the kitchen. The prosecutor, in closing to the jury, had said that the defendant had gotten caught with his hand in the cookie jar. The defendant, of course, in conjuction with his plea of entrapment had admitted participation in each of the heroin distributions.

Appendix "D"

(Tape played.)

BY MR. WILLIAMS: Will you play that portion back?

(Tape played.)

All right, stop.

Mr. Hill, at that point where you said, "I don't take those kind of chances," and after that Mr. Daniels replied "inaudible" --

MR. HUYETT: He didn't reply inaudible.

MR. WILLIAMS: There was an inaudible that we all agreed can't be heard, okay?

Right after that you made a reply.

Do you know what you said?

MR. HILL: Yes, sir.

MR. WILLIAMS: What did you say?

MR. HILL: I said, "I did it because you cats persisted."

MR. WILLIAMS: What does the word "cats" mean other than cats meow? What does "cats" mean?

MR. HILL: Other males, more than one. A cat, cats, meaning more than one.

MR. WILLIAMS: Is that street talk similar to a person?

MR. HILL: Yes.

MR. WILLIAMS: That's similar to when someone refers to hep cat, good, like in music?

MR. HILL: Same difference.

MR. WILLIAMS: You said, "I did it because you cats persisted."

MR. HILL: That's correct.

MR. WILLIAMS: Do you remember saying that?

MR. HILL: Sure.

MR. WILLIAMS: After listening to that tape can you recollect with the tape what you said?

MR. HILL: Yes, sir.

MR. WILLIAMS: May we have that replayed, Your Honor?

THE COURT: Sure.

(Tape played.)

Appendix "E"

MR. WILLIAMS: Now, Mr. Hill -- Officer Fekete, I think we're finished with this particular line right now.

You were there on May 1st when you had a conversation --

THE COURT: Are we finished playing the tape?

MR. WILLIAMS: At this juncture, Your Honor, yes.

THE COURT: I will ask that the transcripts please be collected. I will ask that the speaker be lifted down from the stand.

(Interval.)

MR. WILLIAMS: Mr. Hill, do you recollect being there on May 1st and having that conversation with Mr. Daniels?

MR. HILL: Yes, sir.

MR. WILLIAMS: And do you remember from your own knowledge that you said, "I did it because you cats persisted"?

MR. HILL: That's correct, true.

MR. WILLIAMS: Now, Mr. Hill, Mr. Daniels said he was trying to find some sources and therefore said to you he wanted to get into the business.

Do you recall that?

MR. HILL: Yes.

MR. WILLIAMS: Did you have any business going on?

MR. HILL: No, sir.

THE COURT: Did he have any what?

MR. WILLIAMS: Business going on, talking about any heroin business.

MR. HILL: No sir.

Appendix "E"

THE COURT: Members of the jury, I have a note from you, or perhaps it may be two notes, but I will read you what I have and then I will tell you how I interpret the question or questions which are asked.

"Your Honor, if the defendant was entrapped could the defendant be not guilty of all counts, (Count 1 to Count 7)."

And that's signed by Mr. Nigro. And then:

"Can defendant be guilty of Counts 2 to 7, (distribution) if entrapment was involved in any other count."

Again signed by Mr. Nigro.

I interpret these two questions to ask me essentially whether or not if you find that there was entrapment as to any one count does that mean that there was of necessity entrapment as to all the other counts.

Is that you question?

JUROR NIGRO: Yes, sir.

Appendix "F"

MR. KLEIN: Members of the jury, I submit to you that that comment is not the comment of somebody who is in any way entrapped into acting. That was the comment of a knowing, willing drug dealer, somebody that wants to deal not only $3100 worth today but in the future, longevity. It also goes to show, of course that Paul Hill is the kind of person who understands what that means, and that apparently becomes important based on the defense that the defense put on.

They then go to Society Hill Towers and a heroin transaction takes place. At that time Paul Hill receives the amount of $3100. Mr. Newton has the drugs. As you have heard that's standard in partnership situations. One guy holds the money, one guy holds the drugs, nothing unusual about that.

Appendix "G